

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-07/09-409
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 Appeal of)

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, denying his request to expunge his name from the child abuse and neglect registry. The issue is whether the Department abused its discretion when it denied petitioner's expungement request.

A telephone status conference was held on September 2, 2009. The decision is based on the record below and the parties' written argument.

1. The petitioner was substantiated for sexual abuse on or about June 2003. The original date of the report to the Department was September 6, 2002. The substantiation involves petitioner's conduct towards A.B. Petitioner and his wife first met A.B. when she was seven years old. Over the years, petitioner befriended A.B. including inviting A.B. for sleepovers. Petitioner was aware that A.B. had been sexually abused by a family member.

The first incident occurred in 2001 when A.B. was thirteen years old and staying overnight at petitioner's home. The petitioner was substantiated for an incident in which A.B. stated that petitioner gave her alcohol to drink, that she fell asleep and woke to petitioner laying on top of her, and that petitioner showed his penis to her. Petitioner does not dispute giving A.B. some alcohol to drink and does not dispute that he was wearing boxer shorts that night but he does dispute the other details of A.B.'s account that are part of the investigation record.

The second incident occurred in August 2002 when petitioner took A.B. and her brother to a baseball game; A.B. stated that petitioner touched her thigh several times. Petitioner does dispute the other details of A.B.'s account that are part of the investigation record.

Petitioner sought legal counsel at the time of the substantiation in 2003, but petitioner did not file a timely appeal of the substantiation.

2. The petitioner filed for expungement on or about January 2, 2009.

3. In support of his request for expungement, the petitioner submitted a letter dated April 19, 2009 that mainly addressed his disagreement with the basis of the

substantiation. Petitioner submitted copies of four letters of reference. The four letters were copies of reference letters that petitioner had submitted to a local supervisory union for a job as a bus driver. The letters attested to his job qualifications and his good character.

4. The petitioner did not submit any documentation regarding counseling or documentation of a psychological assessment.

5. Petitioner has been substantiated one time by the Department.

6. Petitioner filed his request for expungement six years after the substantiation (seven years after the report was made to the Department).

7. To support his request for expungement, petitioner informed the Department that after the substantiation, he did not interact with children unless an adult was present.

8. A Commissioner's Review was held on April 29, 2009 between the petitioner and, R.C., Registry Reviewer. The Commissioner's Review denying petitioner's request for expungement was issued on June 26, 2009 and was signed by R.C. and T.Z., Registry Review Unit Director. The reviewers relied on the following information in making their determination:

- a. Documents submitted by petitioner.
- b. April 19, 2009 letter from petitioner.
- c. Reviewer notes.
- d. Intake Form from June 2002.
- e. Summary of Investigative Activities by Social Worker T.J.B. dated 9/6/02.

9. The Department denied expungement due to concerns that petitioner had not submitted documentation relating to his conduct around children or showing changed behavior or circumstances since the substantiation. The Department noted that petitioner had not participated in counseling or therapy. The Department noted that petitioner was convicted in April 2009 of embezzlement from the Veterans Administration leading to restitution and probation.

The Department did not believe that sufficient change had occurred so that this type of incident would not occur in the future.

10. The petitioner appealed the denial of his expungement request on July 27, 2009.

ORDER

The Department's decision is affirmed.

REASONS

Although the petitioner filed for fair hearing to dispute the Department's expungement decision, the petitioner has written extensively about his disputes with the underlying 2003 decision to substantiate him for sexual abuse and written extensively about his disputes with how the Department conducted the investigation. Up to this point, petitioner has characterized his fair hearing request as one dealing with the Department's failure to expunge his name from the registry. Now, in his reply to the Department's legal argument, he asks the Board to reopen the substantiation case. He does acknowledge that the standard for review in expungement cases is abuse of discretion.

The Board has no authority to open the 2003 substantiation case. 3 V.S.A. § 3091(a). Petitioner sought legal advice upon receiving the substantiation. Petitioner had the opportunity to ask for review in 2003 but did not do so. He is simply out of time to now make that request.

In expungement cases, the Board looks to 33 V.S.A § 4916c.

The applicable provisions are found in 33 V.S.A. § 4916c(b) which state:

The person shall have the burden of proving that a reasonable person would believe that he or she no longer presents a risk to the safety or well-being of children. Factors to be considered by the commissioner shall include:

(1) The nature of the substantiation that resulted in the person's name being placed on the registry.

(2) The number of substantiations, if more than one.

(3) The amount of time that has elapsed since the substantiation.

(4) The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur.

(5) Any activities that would reflect upon the person's changed behavior or circumstances, such as therapy, employment or education.

(6) References that attest to the person's good moral character.

A person may appeal to the Human Services Board if the commissioner denies his/her request for expungement. Board authority is set out in 33 V.S.A. § 4916c(e) which states:

The person shall be prohibited from challenging his or her substantiation at hearing, and the sole issue before the board shall be whether the commissioner abused his or her discretion in denial of the petition for expungement. The hearing shall be on the record below, and determinations of credibility of witnesses made by the commissioner shall be given deference by the board.

The sole issue before the Board is whether the Department abused its discretion when they denied petitioner's request for expungement.

The petitioner had an in-person meeting with R.C., Registry Reviewer. The petitioner had an opportunity to submit documentation to support his request. The Department considered all the information submitted by the petitioner as well as the information the Department had from its records. The underlying concern for the Department was whether there was sufficient information that a similar situation was unlikely. The Department found that petitioner's presentation and materials did not allay their questions and concerns.

The Department does look at whether a petitioner takes responsibility for the underlying substantiation. The Department has to be careful in doing so since a disagreement about the underlying substantiation may not be sufficient in and of itself to deny an expungement request. In petitioner's case, he is so consumed with arguing about what occurred, his lack of responsibility, and his perception of A.B.'s responsibility, that petitioner does not look at certain of his actions that give rise to the Department's doubts such as giving alcohol to a minor or wearing boxer

shorts around an adolescent or touching even if the touching is characterized in a different way by petitioner.

Moreover, the petitioner did not use the opportunity to provide the Department with information in support of his request such as references that could give detailed examples about his character and his interactions with children or such as a psychological assessment that could address his appropriateness with children.

Looking at the Department's reasoning, the Board cannot find that the Department abused its discretion in denying the petitioner's request for expungement. Accordingly, the Department's decision is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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